

Brenda C. Desmond
Fourth Judicial District
Missoula County Courthouse
200 W. Broadway
Missoula Montana 59802
(406) 258-4728
bdesmond@mt.gov

Legislative Interim Committee on Law and Justice
September 19, 2013

Madam Chair, Members of the Committee:

My name is Brenda Desmond. I am a Standing Master for the Fourth Judicial District in Missoula, a position I have held for almost twenty years. Thank you very much for inviting me to speak today. The views I present are my own.

In the 1980s I worked for the Montana legislature, including serving as the attorney for the House Judiciary Committee. I have some idea of the hard work you do and the challenges you face; I applaud you for your dedication and service.

I will first give an overview of how we handle family law matters in the Fourth Judicial District, with an emphasis on cases involving children. I will then address three areas, all of which are interrelated: (1) considerations to ensure that the court system does not undermine the co-parenting relationship; (2) approaches to move cases along more quickly; and (3) approaches to respond to the large number of parties who represent themselves. Finally, I will outline my recommendation that the committee explore establishing a family court division of the district court system. I look forward to the committee's questions.

In the last 25 years, the judges of the Fourth Judicial District have taken several steps to improve the way the judicial district handles family law matters. (I agree with Mr. Scott that legislative changes, including the 1997 revision to "parenting" instead of custody have been very effective and beneficial.) In this work to improve the court system, the judges have been greatly assisted by local attorneys, in particular attorneys who specialize in family law. First, in the late 1980s, the judges created a position, special master, now standing master, whose primary responsibility is family law. This was intended to move cases along more quickly. In the mid-1990s, the judges added a second position, mine. The law

Law & Justice Committee Meeting
September 19, 2013 - Day 1

authorizes standing masters to hold hearings and make decisions in all district court civil matters, including divorce and parenting proceedings¹.

In the mid-1990s, the Fourth Judicial District judges adopted parenting guidelines², designed to encourage both cooperation between parents and parenting plan decisions based on principles of child development. I very much support Mr. Scott's recommendation that we move to statewide guidelines. In the late 1990s, with the assistance of the Missoula Community Dispute Resolution Center, the judges established a required "parenting orientation" for all parents who file dissolution proceedings involving children or parenting plan proceedings. This one and one half hour presentation, scheduled monthly, is opened with a brief introduction by a district court judge or standing master who encourages parents to keep children out of any conflict that is occurring, pay attention to child development principles and take advantage of opportunities in the community for mediation of parenting issues. Volunteers from the community, including a child development expert, speak at each session.

(1) There are important considerations to ensure that the court system does not undermine the co-parenting relationship.

The family is the most important American institution. While the composition of the American family has changed in many and varied ways, children's need for stable, loving, competent adults to care for them has not changed. When children are fortunate enough to have two parents assuming a role in their lives, we must encourage this for the children's benefit. If parents are having difficulty co-parenting in a positive manner, I often remind them that they are going to be co-parents forever, not just until their children are 18. There will be graduations, marriages, grandchildren; they may as well start co-parenting positively now.

In the Fourth Judicial District we have already instituted the parenting guidelines and the parenting orientation, both designed to encourage parents to minimize conflict for the benefit of their children. As well, we require all parties to participate in a master-supervised settlement conference, (what some courts refer to as mediation), before a final hearing will be scheduled. Court management that moves cases along in a timely way can discourage parties from engaging in divisive procedural activity.

¹ Montana Code Annotated §§ 3-5-124 – 3-5-126. If a party disagrees with the standing master's decision, he or she can appeal ("object") to a district court judge.

² 2012 Fourth Judicial District Parenting Guidelines are attached.

(2) There are effective strategies to move cases along more quickly.

Just as all families are different, family law cases differ. Some families or couples need time to work through complicated family and property issues involved in their divorce. When that is not the situation, the court system needs to address the needs of families for whom delay in court proceedings may have a negative effect on the co-parenting relationship and thus the children. Prolonged adversarial proceedings can have the unintended effect of driving the parents further apart. As noted in the study resolution, procedural measures such as early neutral evaluation can help move cases along more quickly. In early neutral evaluation, the parties are given a confidential, fair, educated and neutral assessment of the merits of their relative positions. This may encourage adopting more reasonable positions as well as more rapid settlement. Adding opportunities for early neutral evaluation in the court system would improve the process. When both parties are representing themselves, I now schedule a status hearing as soon as possible so I can assess the level of disagreement and complexity of the case and then schedule accordingly to prevent unnecessary delays. When lawyers are involved, we rely on them to work together to schedule discovery, settlement conferences and meetings to attempt interim or final agreements. This is not something we can expect of many self-represented parties.

In Montana we have a summary dissolution process, whose basic requirements are set forth in Montana Code Annotated §40-4-130. In this process, a couple who: is divorcing and either has no children or has settled all parenting and child support issues, has assets less than \$25,000 and unsecured obligations of less than \$8000 may file a joint petition for dissolution that can be scheduled for final hearing 20 days after the petition is filed. In uncomplicated situations, this allows parties to move very quickly through the court process. However, in my experience the majority of couples today has unsecured obligations in excess of \$8000, for example, credit card debt and thus cannot take advantage of the summary dissolution process. I suggest the committee consider recommending an increase in the unsecured debt level to something like \$20,000 or higher.

(3) There are ways to respond effectively to the large number of parties who represent themselves.

You will be hearing more on the subject of unrepresented parties later this afternoon. In the Fourth Judicial District more than 60% of family law cases

involve at least one party who is representing himself or herself. This is a dramatic change from 30 or 40 years ago, when most parties had attorneys. This is true all over the country and courts and legislatures are taking steps to respond to this change.³ In Missoula, through the legislative Court Help funding, we have had a self-help center for five years. The center staff and volunteers, while not providing legal advice, have worked to develop forms for parties to use and to explain the court process to parties. This has been invaluable. Local attorneys' pro bono representation of parties is also an important contribution but the extent of unrepresented parties cannot be met in this way. The Western Montana Bar Association, (WMBA), has also established monthly sessions at which unrepresented parties are able to get legal advice on family law matters from volunteer attorneys. Standing masters conduct some limited settlement conferences, as time permits. The WMBA provides volunteer attorneys to do the same.

If the situation remains as is, the majority of parties will be unrepresented. Yet we have not yet developed a way for parties to get the kind of good advice and wise counsel that parties get from experienced family law lawyers. As well, since widespread divorce is a fairly recent phenomenon, parties' friends and family members are often not able to provide thoughtful guidance on how to cooperate in the parenting relationship, regardless of what has become of the relationship between the two parents. I am not sure what the answer is. Some states, such as Maine, have volunteer attorneys who are present in the courthouse each day to provide limited advice to parties. Other states have prepared written and online guides to court proceedings, including information on hearing issues such as rules of evidence.

Unrepresented parties take more time at every stage of the proceeding. This impacts the work of the clerks of court, court staff and judges. If access to good advice and information is not provided to unrepresented parties, some children's interests will not be well-served.

In conclusion, I recommend that the committee explore establishing a family court as a subdivision of the district court. This would help us progress in in the three areas I have discussed today. Many states have family courts. Their definitions and jurisdiction vary according to state law. They all demonstrate an

³ In Turner v. Rogers (2011): the United States Supreme Court addressed the importance of courts' providing procedural fairness, including access to forms, to self-represented parties.

effort by the court system to address the needs of families though: (a) specially-trained judges and staff, (b) bringing all cases involving a family into the same court and (c) the use of procedures designed to support families. Some families have complex problems and are involved in a number of court proceedings.

Managing and determining divorces and parenting cases, juvenile delinquency matters and child protection matters in one setting benefits children and families in the long run. Since each state determines the scope of its family court, Montana could design family court authority in a way that works best for our citizens. I would be happy to provide additional information.

Thank you.